

N.E. COLORADO CELLULAR, INC. D/B/A VIAERO WIRELESS

April 8, 2011

PROBLEM

In WT Dkt. No. 10-112, the Commission proposes to adopt a ban on the filing of competing renewal applications and to apply the ban retroactively to dismiss Viaero's Nebraska 1 application that has been pending already for 10 years, 6 months, and 10 days. By so doing, the Commission will deprive Viaero of its accrued right to a full hearing under § 309(e) of the Act and the *Ashbacker* doctrine.

The application of the ban on the filing of applications that are mutually exclusive with renewal applications to dismiss a pending application would constitute prohibited retroactive rulemaking under the Supreme Court's impairment-of-a-right test.

The Commission has advanced no plausible justification for refusing to designate the only contested cellular renewal case for the expedited hearing called for by § 22.935(c). The retroactive application of the ban and the dismissal of Viaero's application will be viewed as expunging the Commission's failure to abide by its own rules *since it has never held a hearing under § 22.935*.

TIMELINE

July 14, 1994	The Commission adopts the two-step comparative hearing process for competing renewal applications under § 22.935 with knowledge that the D.C. Circuit had found that a two-step renewal procedure violated § 309(e) of the Act and the <i>Ashbacker</i> doctrine
Sept. 29, 2000	Viaero timely filed an application that is mutually exclusive with Sagir's application to renew its license for Nebraska 1
Sept. 24, 2004	Viaero's <i>Ashbacker</i> rights accrued, because the Bureau completed its substantive review of the Viaero and Sagir applications making them ripe for designation for a comparative hearing under § 22.935(c)
Sept. 24, 2008	The delay in designating the Nebraska 1 applications for a comparative hearing became unreasonable under the standards of the D.C. Circuit

- May 24, 2010 The Commission issues an order imposing a “hold” on all currently pending competing renewal applications to preserve any legal rights that pending renewal applicants have, but states that it will dismiss all pending applications that are mutually exclusive with renewal applications if it adopts its proposed ban on the filing of such applications
- Sept. 24, 2010 The delay in designating the Nebraska 1 applications for hearing became egregious under the standards of the D.C. Circuit